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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re	}	Case No. 10-61077-B-13
Mike John Morgantini and	}	DC No. MHM-1
Janey Doreen Morgantini,	}	
Debtors.	}	

**MEMORANDUM DECISION REGARDING TRUSTEE'S
OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN**

This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Deanna K. Hazelton, Esq., appeared on behalf of the chapter 13 trustee, Michael H. Meyer, Esq.

Robert S. Williams, Esq., appeared on behalf of the debtors, Mike John Morgantini and Janey Doreen Morgantini.

Before the court is an objection (the "Objection") by the chapter 13 trustee, Michael H. Meyer, Esq. (the "Trustee"), to confirmation of the chapter 13 plan (the "Plan") filed by Mike and Janey Morgantini (the "Debtors"). The parties waived the right to an evidentiary hearing and agreed to submit the matter after the filing of supplemental briefs.

The Trustee contends that the Plan fails to satisfy the "disposable income" test under 11 U.S.C. § 1325(b)(1)(B)¹ because the Debtors claimed three deductions

¹Unless otherwise indicated, all bankruptcy, chapter, code section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated *after* October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,

1 on their amended Form 22C (the "Means Test"),² which exceed the amounts already
2 allowed for the designated expense categories in the National and Local Standards
3 published by the Internal Revenue Service (the "IRS Standards"). Specifically, the
4 Debtors deducted additional expenses which reflect the amounts they actually pay
5 monthly for housing and utilities, transportation, food and clothing. The Debtors
6 contend that these additional expenses should be allowed as "special
7 circumstances." For the reasons set forth below, the Trustee's Objection to
8 confirmation of the Plan will be sustained.

9 This memorandum contains the court's findings of fact and conclusions of
10 law required by Federal Rule of Civil Procedure 52(a), made applicable to this
11 contested matter by Federal Rule of Bankruptcy Procedure 7052. The bankruptcy
12 court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 11 U.S.C.
13 § 1325 and General Orders 182 and 330 of the U.S. District Court for the Eastern
14 District of California. This is a core proceeding as defined in 28 U.S.C.
15 §157(b)(2)(A) & (L).

16 **Background and Findings of Fact.**

17 The Debtors' petition was filed on September 25, 2010. With the petition,
18 they filed their Plan together with all required documents and schedules. The
19 Debtors live in Bakersfield, California. Based on schedule I, Mr. Morgantini is
20 employed as a supervisor by the City of Visalia. Mrs. Morgantini is retired and
21 drawing social security. The Debtors have one automobile, a 2002 Kia Optima, that
22 has 160,000 miles and which the Debtors valued at \$800. The Debtors have no
23 dependents, leaving a household size of two. The Debtors' annualized current
24 income, stated on the Means Test to be \$89,286.48 (\$7,440.54 per month) is above
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Apr. 20, 2005, 119 Stat. 23.

28 ²The Debtors filed an amended Form 22C on November 18, 2010, after the Trustee filed this Objection. The court deems the Objection to relate to the amended Form 22C.

1 the median income for their household size.³ From their income, the Debtors have
2 deducted monthly expenses totaling \$7,451.76. The resulting “monthly disposable
3 income” on line 59 of the Means Test is *negative* \$11.22.

4 On line 24A of the Means Test, the Debtors deducted \$985 for “food, apparel
5 and services, housekeeping supplies, personal care, and miscellaneous.” On line
6 25A of the Means Test, the Debtors deducted \$423 for “housing and utilities; non-
7 mortgage expenses.” On line 27A, the Debtors deducted \$436 for “transportation;
8 vehicle operation/public transportation expense.” These are the “no-look”
9 deductions allowed in these categories for the Debtors’ family based on the IRS
10 Standards. On line 57 of the Means Test, the Debtors claimed three additional
11 “special circumstances” deductions described as “Housing and utilities” (\$752.63),
12 “Transportation” (\$395.23), and “Food clothing & other” (\$281.35) in the total
13 amount of \$1,429.21 (collectively, the “Additional Expenses”). Altogether, the
14 Debtors have deducted, on lines 24A, 25A, 27A and 57, monthly expenses in these
15 three categories totaling \$3,273.21.

16 The Debtors’ Plan provides for monthly payments to the Trustee in the
17 amount of \$2,200 for 60 months, which will include their postpetition mortgage
18 payment. The Plan provides that the unsecured creditors with claims in the
19 estimated amount of \$181,236.35 will receive a 5% distribution, or approximately
20 \$9,061 over the life of the Plan. The Trustee contends that the Debtors’ deductions
21 are too high, meaning that the unsecured creditors are entitled to receive a higher
22 distribution. Specifically, the Trustee objects to the Additional Expenses deducted
23 on line 57 of the Means Test.

24 In response, the Debtors filed a declaration in an effort to explain the
25 Additional Expenses and to justify their inclusion as “special circumstances.” With
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28 ³The Debtors’ gross monthly income reported on schedule I is \$7,327.59. As a
government employee, Mr. Morgantini is anticipating postpetition pay cuts in the approximate
amount of 9%.

1 regard to the "non-mortgage housing and utilities" expense, the Debtors have
2 deducted a total of \$1,175.63. The Debtors explain that they live in an old home
3 with high utility costs. Their electricity and gas bills average \$346.67 per month,
4 repairs to the home and air conditioner average \$141.70 per month, their water bill
5 is \$55 per month and septic tank maintenance is \$58.33 per month (\$700 per year).
6 The Debtors also pay \$125 per month for a lawn service because Mr. Morgantini
7 "works out of town and does not have time to do this himself." They hire a tree
8 trimming service at the cost of \$125 per month (\$1,500 per year). The Debtors
9 maintain their own swimming pool, but have deducted \$100 per month for
10 swimming pool supplies. They also support two cellular telephones at an average
11 monthly cost of \$185.27 and a "land line" phone at a cost of \$38. They need all of
12 these telephones to "stay in touch." Altogether, the Debtors have offered an
13 explanation for "non-mortgage housing and utility expenses" totaling \$1,174.97 per
14 month.

15 With regard to transportation expenses, the Debtors explain that Mr.
16 Morgantini travels a long distance commuting 2½ hours per day, five days per week,
17 from Bakersfield, California, to Visalia, California for work. His monthly gasoline
18 bill is \$519.12 and monthly car repairs average \$115.94. Altogether, the Debtors
19 have deducted on lines 27A and 57 of the Means Test a total of \$831.23 for
20 "transportation" expenses. However, their declaration only shows that they spend
21 \$635.06. They only have one automobile. The remaining \$196.17 is not explained.

22 Finally, in the "food, clothing, & other" category, the Debtors have claimed
23 deductions on lines 24A and 57 totaling \$1,266.35 per month. Their declaration
24 explains that they spend \$1,024.02 per month on groceries and other food primarily
25 because Mr. Morgantini "eats out a lot." The remainder of the deduction for "food,
26 clothing & other" (\$242.33) is not explained.

27 **Issues Presented.**

28 The singular issue presented here is whether the Debtors may deduct, as

1 “special circumstances,” on line 57 of the Means Test, the actual expenses they
2 incur in excess of the “no-look” deductions already allowed by the IRS Standards.

3 **Applicable Law.**

4 The analysis begins with Bankruptcy Code § 1325(b)(1)(B). A chapter 13
5 plan may not be confirmed over the objection of an unsecured creditor, or the
6 chapter 13 trustee, unless it provides for payment of the debtor’s “projected
7 disposable income” to the allowed claims of unsecured creditors. The term
8 “projected disposable income” is a number that is calculated through the Means
9 Test, based on the debtor’s income and various allowed deductions. The Means
10 Test determines, *inter alia*, which statutes will govern the calculation of “disposable
11 income,” how much the debtors must pay to their unsecured creditors, and how long
12 the debtors’ chapter 13 plan must provide for those payments.

13 The Means Test was created as part of the Bankruptcy Abuse Prevention and
14 Consumer Protection Act (“BAPCPA”), which Congress enacted “to correct
15 perceived abuses of the bankruptcy system” and to “help ensure that debtors who
16 *can pay creditors do pay them.*” *Ransom v. FIA Card Services, N.A. (In re Ransom)*,
17 131 S.Ct 716, 721 (2011) (emphasis in original, citations omitted). The Means Test
18 was designed by Congress “to measure debtors’ disposable income and, in that way,
19 ‘to ensure that [they] repay creditors the maximum they can afford.’” *Id.* at 725.

20 Here, the Means Test shows that the Debtors’ monthly income exceeds the
21 State of California’s median income which makes the Debtors “above median
22 income.” From the current monthly income, the Debtors may deduct “amounts
23 reasonably necessary for the maintenance or support of the debtor or a dependent.”
24 § 1325(b)(2)(A)(i). For “above median income” debtors, the term “amounts
25 reasonably necessary for maintenance or support” is determined with specific
26 reference to § 707(b)(2), subparagraphs (A) and (B). § 1325(b)(3). Section
27 707(b)(2)(A) allows the deduction of living expenses based, *inter alia*, on the IRS
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Standards.

In addition to expenses allowed by the IRS Standards, a debtor may also be able to deduct expenses which can be categorized as “special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces.”

§ 707(b)(2)(B)(i). The debtor has the burden of proof to establish the “special circumstances” through an analysis involving a four-part inquiry. To justify an additional expense or adjustment to current monthly income, the debtor must (1) demonstrate that there is no reasonable alternative for the additional expense (§ 707(b)(2)(B)(i)), (2) itemize the additional expense (§ 707(b)(2)(B)(ii)), (3) provide documentation for the expense (§ 707(b)(2)(B)(ii)(I)), and (4) provide a detailed explanation of the special circumstances that make the expense necessary and reasonable (§ 707(b)(2)(B)(ii)(II)).⁴ The debtor must attest under oath as to the accuracy of the information offered to demonstrate that the “special circumstance” expenses or adjustments to income are required (§ 707(b)(2)(B)(iii)).

For purposes of the Means Test, Congress did not provide an exhaustive list of “special circumstances,” but it did give examples of situations which the court should consider as qualifying. It has been noted, that the examples given by Congress (a serious medical condition or a call to active duty in the Armed Forces) “both constitute situations which not only put a strain on a debtor’s household budget, but they arise from circumstances normally beyond the debtor’s control.” *Egebjerg v. United States Trustee (In re Egebjerg)*, 574 F.3d 1045, 1053 (9th Cir. 2009) (citation omitted).

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⁴There is no supporting documentation in the record for the Additional Expenses. The Debtors contend that their supporting documents were provided to the Trustee for review and the Trustee does not contend in this Objection that the Debtors’ Additional Expenses were not adequately itemized or documented by the time this matter was submitted for a ruling. This Objection is based solely on the first and fourth “special circumstances” factors identified above.

1 **Analysis.**

2 **The Additional Expenses Do Not Qualify as “Special Circumstances.”**

3 The Debtors contend in their supporting declaration that all of the Additional
4 Expenses are reasonable and necessary for a variety of reasons, including the facts
5 that they have an older home with high utility bills and Mr. Morgantini has to
6 commute a long distance to work. Although some of the Debtors’ additional
7 expenses, such as job related commuting expenses, may qualify as “special
8 circumstances,” if properly documented, the court does not need to rule as to every
9 itemized Additional Expense requested by the Debtors. So long as a significant
10 amount of the Additional Expense is disallowed, then the Plan will not satisfy
11 § 1325(b)(1)(B).

12 The difficulty here lies in the fact that the Debtors’ declaration offers little
13 from which the court can separate “necessary” expenses from “lifestyle” choices.
14 The IRS Standards already allow “no-look” deductions, on lines 24A, 25A and 27A
15 of the Means Test for the three categories of expenses listed on line 57. The
16 Debtors took those full deductions. With some exceptions not applicable here, the
17 Bankruptcy Code does not allow the deduction of actual expenses, in excess of
18 those specifically allowed by the IRS Standards, simply because the debtors actually
19 spend that amount of money. Indeed, the Bankruptcy Code specifically states that
20 certain deductions for “above-median income” debtors “*shall be* the debtor’s
21 applicable monthly expense amounts specified under the [IRS] Standards . . . in
22 effect on the date of the order for relief.” § 707(b)(2)(A)(ii)(I). (Emphasis added.)⁵
23 Clearly, with the enactment of BAPCPA, Congress intended that debtors who seek
24 bankruptcy relief, and whose lifestyle may interfere with the ability to fully pay their

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26 ⁵Line 26 of the Means Test provides for consideration of additional “housing and
27 utilities” expenses to which a debtor may be entitled under the IRS Standards if it can be shown
28 that the IRS Standards “do not accurately compute the allowance.” The Debtors did not take any
deduction on line 26.

1 creditors, must be prepared to make some adjustments to their lifestyle in a good
2 faith effort to repay the creditors as much as they can afford. The Debtors are
3 essentially asking their creditors to fund the cost of their lifestyle.

4 The wording of the Bankruptcy Code allows the court some discretion to
5 allow a "special circumstance" expense when there is a true need for the expense
6 due to circumstances which are clearly beyond the debtor's control and for which
7 there is no reasonable alternative. Cases in which the courts have allowed the
8 deduction of extra expenses usually involve extraordinary situations. Here, the
9 Debtors' declaration fails to show that all of the Additional Expenses they have
10 claimed are the result of "extraordinary circumstances" and factors "beyond their
11 control." Indeed, their declaration raises more questions that it answers. For
12 example, the Debtors spend over \$1,000 per month on food, for two people, because
13 Mr. Morgantini works out of town and "eats out a lot." Why can't Mr. Morgantini
14 take his lunch to work instead of "eating out a lot" at the expense of his creditors?
15 Is it absolutely necessary that Mr. Morgantini eat all of his meals in restaurants, or is
16 that a lifestyle choice? Clearly, there is a reasonable alternative to eating
17 exclusively in restaurants five days a week.

18 The Debtors spend \$1,500 per year to trim the trees on their property and an
19 additional \$1,500 per year for lawn service because Mr. Morgantini does not have
20 time to mow the lawn. Why should the creditors pay for a lawn service to mow the
21 Debtors' lawn just because Mr. Morgantini does not think he has time to do it
22 himself? Unless Mr. Morgantini is physically unable to maintain his yard, then the
23 choice to pay for a lawn service is a lifestyle choice for which there is a reasonable
24 alternative. Why do the trees on the Debtors' property have to be trimmed every
25 year at the expense of their creditors? Do the trees present a safety hazard, or is tree
26 trimming a lifestyle choice? What kind of cellular telephone service are they paying
27 for at the cost of \$185.27 per month? Is it basic service or do they have "smart
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1 phones” with unlimited texting and internet service?⁶ If the Debtors only have one
2 automobile, which Mr. Morgantini uses to commute to work each day, why can’t the
3 Debtors “stay in touch” with less cellular telephone expense using their “land line
4 service”? The Debtors had the burden of proof to answer these questions and show
5 that the Additional Expenses are truly “special circumstances.” They have failed to
6 do so.

7 Before concluding, it is important to note that the traditional “current
8 monthly income/disposable income” analysis has changed since the U.S. Supreme
9 Court decided *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010). It is now established
10 that the calculation of “projected disposable income” is not necessarily tied to
11 prepetition conditions and the court may take into consideration postpetition
12 changes in the Debtors’ income and expenses “that are known or virtually certain at
13 the time of confirmation.” *Id.* at 2478. Since the commencement of this case, the
14 Debtors’ personal and financial situation may have changed in a way that makes the
15 allowance or disallowance of certain expenses more appropriate or irrelevant.
16 Based on this ruling, the Debtors will need to amend their Means Test to properly
17 calculate their projected disposable income. However, when they return to court to
18 confirm a modified plan, the court anticipates that the Trustee’s approval, or
19 rejection, of that modified plan will take into consideration the principals in
20 *Lanning*.

21 The court also notes that the Debtors’ proposed Plan already provides for a
22 5% distribution to unsecured creditors, even though the original Means Test shows
23 the lack of any disposable income. The court has not been asked to consider
24 whether its ruling here, disallowing the Additional Expenses, will result in a


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26 ⁶It is this court’s observation that family-wide, full high cost cellular telephone/internet
27 service is becoming an expectation in a growing number of chapter 13 bankruptcy cases. Until
28 the IRS Standards recognize “smart phones” and unlimited texting as a “necessary and
reasonable” expense, the courts should be reluctant to set that standard as the new “normal.”

1 distribution of greater than 5%. For that matter, the practical affect of this ruling
2 may be insignificant. That said, the court leaves open the possibility that the parties
3 may now be able to reach a compromise solution and proceed with confirmation of
4 this Plan with some adjustments reflected in the confirmation order, and without the
5 need for further litigation.

6 **Conclusion.**

7 Based on the forgoing, the Debtors have failed to satisfy their burden of
8 proof with regard to the calculation of projected disposable income and compliance
9 with § 1325(b)(1)(B). To the extent that the Debtors are requesting "special
10 circumstance" deductions totaling \$1,429.21 on line 57 of the Means Test,
11 representing monies they actually spend in excess of the no-look deductions already
12 allowed and taken under the IRS Standards, those deductions will not be allowed in
13 full. The Trustee's Objection to confirmation of the Plan will be sustained.
14 Confirmation of the Plan will be denied without prejudice to the parties' right to
15 compromise this matter and yet confirm this Plan with the settlement terms reflected
16 in the confirmation order.

17 Dated: September 27, 2011

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21 W. Richard Lee
22 United States Bankruptcy Judge
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Mike John Morgantini & Janey Doreen Morgantini
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